No. 87 1958

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

LOUIS M. GIARDINA,

*Petitioner,*

– against –

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. Whether petitioner's conviction for obstructing a federal criminal investigation should be reversed because there was no ongoing federal investigation to obstruct and because the return to a purported co-conspirator of his own money cannot, as a matter of law, constitute bribery.

2. Whether the admission of hearsay which was neither needed as expert testimony nor as background evidence deprived the petitioner of his right to a fair trial.

## List of Parties

Apart from petitioner, the only other party to the appeal before the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, was George Daly.

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Louis M. Giardina respectfully prays that a writ of certiorari issue to review a judgment of the United States

Court of Appeals for the Second Circuit entered on March 28, 1988.

## Opinion Below

The opinion of the Court of Appeals, styled as United States v. Daly, Nos. 87-1257, 87-1258 (2d Cir. Mar. 28, 1988) is not yet officially reported, but is reprinted in the Appendix hereto at pages 1a-61a (Appendix A). The order of the Court of Appeals affirming petitioner's conviction appears in the Appendix at pages 62a-63a (Appendix B).

## Statement of Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 28, 1988, and this petition for a writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## Statutory Provisions

The statutory provisions involved are set forth in full in Appendix C. These provisions are: 18 U.S.C. § 2, 18 U.S.C. § 1510, 18 U.S.C. § 1962 and 29 U.S.C. § 186.

## Statement of the Case

Louis M. Giardina (hereinafter the "petitioner") petitions this Court following the affirmance of his conviction after a jury trial before the Honorable Jack B. Weinstein, formerly Chief Judge of the United States District Court for the Eastern District of New York. Petitioner was convicted on one count of aiding and abetting in the receipt of a bribe, in violation of the Taft-Hartley Act, 29 U.S.C. §§ 186(a)(2) and (b)(1) and 18 U.S.C. § 2; one count of obstructing a criminal investigation, in violation of

18 U.S.C. § 1510; and one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d). He was sentenced to concurrent prison terms of five years each on the conspiracy and obstruction counts, and to one year on the Taft-Hartley count. In addition, petitioner was ordered to pay fines totalling $40,000, as well as special assessments of $50 on each count.

Petitioner appealed his conviction to the United States Court of Appeals for the Second Circuit, predicating his appeal on three separate grounds. First, petitioner argued that the evidence presented to the petit jury was insufficient to establish his guilt beyond a reasonable doubt on the Taft-Hartley and RICO conspiracy counts.

Second, petitioner argued that the evidence was insufficient to support his conviction for obstructing a criminal investigation. Finally, petitioner contended that the district court erred in admitting prejudicial hearsay testimony under the guise that it was expert testimony offered as "background."

The Court of Appeals rejected each of these contentions. See Appendix A.

## Statement of Facts

Petitioner was originally named with 15 other defendants in a 22-count indictment charging the commission of 12 different offenses. He and two of his co-defendants, George Daly and Julius Miron, were severed and stood trial separately after the district court held that a single trial of all

16 defendants presented the likelihood of enormous spillover prejudice to petitioner, Daly and Miron. United States v. Gallo, 668 F. Supp. 736 (E.D.N.Y. 1987).

The government's case against these three defendants was presented principally through the testimony of FBI Agent James Kossler, who purported to be an expert in the area of organized crime; Robert Matthews, an officer of Matthews Industrial Piping Co. ("Matthews Piping"), a piping contractor and an "employer" within the meaning of the Taft-Hartley Act; and tape recordings which were obtained through court-ordered eavesdropping of the home of Paul Castellano, who the government alleged was the head of the Gambino organized crime family.

The government's first witness, Kossler, testified over defense objection about the existence of an organized crime family, its membership, activities and methods of operation. Kossler identified many members of the Gambino crime family, described the positions he claimed that they held in the family and related his opinion of how the organization supposedly operated. Agent Kossler's testimony was originally admitted by the trial court with the caveat that it should be considered only as "general background" since it was based upon hearsay. Nevertheless, when final instructions were given, the trial court advised the jurors that they could consider this testimony as proof of the existence of the enterprise charged in the indictment: namely, the Gambino crime family.

The introduction of this highly prejudicial testimony set the stage for the errors which followed. After Agent Kossler was permitted to testify about the infiltration of labor unions by organized crime, the government called its star witness, Robert Matthews, to testify as to alleged payments which he made to co-defendant Daly to secure labor peace. Matthews testified that in 1981, his company, Matthews Piping, submitted a bid on a contract to renovate the piping system at the Port Mobil deepwater pipeline facility in Staten Island, New York. Matthews planned to use welders from other states to perform the job because Local 638 did not have enough men with the requisite skills. Consequently, his bid reflected the lower cost of using imported labor.

In the fall of 1981, Matthews purportedly arranged a meeting with Daly to obtain his approval for using imported labor on the job. At that meeting, Matthews allegedly explained to Daly why he needed to use "outside" welders, and gave Daly an envelope containing $5,000 in cash.

Matthews Piping was awarded the Port Mobil contract in November 1981. Shortly after the outside welders began work, Local 638 picketed the job site. They were led by the Staten Island delegate of Local 638, Thomas Patchell. Accordingly, Matthews met with Daly a second time, while the picketing was in progress, and gave him an additional $5,000 in cash.

Notwithstanding the pickets, Matthews' outside welders continued to work at the facility. Ultimately,

however, Patchell discovered that they belonged to a union local in Oklahoma, and he filed charges against them for accepting employment with a non-union contractor. Consequently, in December of 1981, all of the out-of-town welders were fined and left the job.

Despite being without the welders he needed to perform his contract, Matthews was unsure whether or not he complained to Daly at that point. In any event, he felt that Daly was powerless to help him because Patchell was really the one in charge.

In January 1982, Matthews purportedly approached co-defendant Julie Miron, a businessman he had known for some 20 years, for help with the problems he was having at Port Mobil. He claimed that Miron told him that he could arrange to eliminate the union's objec-

tion to his use of outside welders, but that it would cost Matthews roughly $100,000.

Through a fraudulent check-cashing scheme, Matthews generated the cash necessary to make this payment. A few weeks later, he purportedly went to Miron's home and gave him $50,000; Matthews delivered another $50,000 to Miron at a later time. Matthews said he was annoyed because when he saw Miron to make the second payment, Miron purportedly told him that he had given 25,000 of the first payment to Daly, which Matthews thought was foolish. Miron never told Matthews what he did with the remainder of the funds.

Notwithstanding Matthews' purported efforts, he was ultimately forced to sign a collective bargaining agreement with Local 638 in May of 1982. He said

he tried to contact both Daly and Miron to get his money back, but was totally unsuccessful in his attempts to reach Daly. Although he allegedly spoke with Miron, he claimed that Miron was unresponsive to his demands.1/

On cross-examination, however, Matthews acknowledged that $50,000 of the $100,000 that he allegedly had paid to Miron was returned to him. He testified that he received the money in two payments of $25,000 each in approximately July of 1982.

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1/ Matthews even claimed that he sent a registered letter to Miron, telling him that he wanted "some of the money back at least." However, he could not recall when he wrote the registered letter, he never showed it to anyone else, and he could not locate a single copy of it, claiming that it had been "mislaid someplace."

Much later, in May of 1984, Matthews was contacted by an FBI agent and interviewed about the Port Mobil job. Despite all that allegedly occurred vis-a-vis his attempt to use outside labor, Matthews did not reveal a word about his involvement in the purported payoffs to the FBI. It was only after his counsel had five or six meetings with government representatives and Matthews was promised immunity that he finally admitted his role as an accomplice in the purported payoffs to government agents.

Matthews' testimony never touched upon the petitioner Giardina. Rather, the government's case against Giardina hinged upon conversations which were surreptitiously recorded from the home of Paul Castellano. These conversations were intercepted in the spring of

1983, more than a year after the transactions which formed the basis for the substantive counts in the indictment occurred.[2/] These tape-recorded conversations included one on May 5, 1983 and one on June 2, 1983 in which Giardina and Castellano discussed the purported payments made by Matthews to Daly and Miron.

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[2/] To recap the events in chronological order briefly: 1) in November of 1981, Matthews allegedly met with Daly and paid him $5,000 on two occasions; 2) in January 1982, Matthews met with Miron, agreed to pay him $100,000, and thereafter paid him $50,000 on two occasions; 3) in May 1982, Matthews was forced to sign a contract with Local 638, and complained to Miron that he wanted his money back; 4) in July 1982, $50,000 of the monies which Matthews had allegedly paid to Miron was returned to Matthews; and 5) in May of 1984, Matthews was first contacted by government agents but did not disclose his role in the purported payoffs.

The May 5, 1983 conversation is particularly noteworthy because it reveals that Castellano and particularly Giardina had just found out about the Matthews/Miron/Daly transaction. This is significant because the May 1983 conversation took place almost a year and a half after the alleged payment from Matthews to Daly in January of 1982, some ten months after Matthews was repaid by Miron in July of 1982, and a year before either Matthews or any of the defendants became aware that a criminal investigation of Port Mobil had been commenced in May of 1984.

The May 5, 1983 conversation amounted to an effort by Castellano and Giardina to understand transactions which they had not participated in and only recently learned about. Although

Castellano and Giardina shared information that they had apparently obtained from separate sources, they remained virtually in the dark about what had actually occurred:

> CASTELLANO: (IA) This guy [Matthews] laid out money. Purcell [sic] didn't get nothin'. Purcell's, ah, ah, policing (ph) the job. What do you want this man to do?
>
> GIARDINA: I think he's trying, I think he's trying to say that he was supposed to have gotten 50 . . . George.
>
> CASTELLANO: Who?
>
> GIARDINA: Daly. And Julie told him he was gonna get 50. And with that 50, then he was gonna take care of Tommy. Because with the first 25 he took care of the other guy, he claims either 10 or 15,000 he gave the other guy.
>
> CASTELLANO: Well, there's something wrong because, now what he [Daly] wanted is all the money this guy [Matthews] laid out. I think this guy mighta laid out 50, 25 and 25. I'm

> almost sure.[3] I know, I know Julie came back, Julie got a little. Anyhow, it was whacked up but I don't know who got what money. I don't know, I don't know to tell you the truth. . . . (A. 115)[4]

The one thing that was clear from the conversation was that Castellano felt that Matthews had been wronged by Daly, since Daly accepted the payments from Matthews but never did anything to help him. Repeatedly, Castellano expressed his belief that Daly had treated Matthews unfairly:

> CASTELLANO: It's a shame to let the guy [Matthews] down. . . . (A. 102)

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[3] Contrary to what Castellano believed, Matthews testified that he paid Daly not $50,000, but $100,000, in two $50,000 installments.

[4] Numbers preceded by "A." refer to pages of the Appendix filed by the petitioner with the United States Court of Appeals for the Second Circuit in connection with his appeal to that court.

* * *

CASTELLANO: (IA) The problem you got over here is that this man [Matthews] paid money, he [Daly] took money under false pretenses. (A. 109)

* * *

CASTELLANO: The man [Matthews], the man never got anything for his money. (A. 124)

* * *

CASTELLANO: [N]ow in the meantime, this guy never got any, any results. (A. 127)

The tape of May 5, 1983 further indicates that Miron apparently gave some of the money he had received from Matthews to Castellano, and that Castellano, in turn, gave $4,000 to Giardina. However, as indicated, Castellano was upset because he did not believe that Matthews had yet been repaid, and he thought that because Matthews had not received the benefit

of his bargain, at least $25,000 should be returned to him.

Unbeknownst to Castellano and Giardina, however, Daly had apparently already repaid Matthews. On June 2, 1983, Giardina told Castellano that he had spoken with Daly and that:

> GIARDINA: He [Daly] says the guy's [Matthews] happy, this, that, and the other thing. So now I still have the other four of our end, you know, you tell me what to do, Paul, and . . . (A. 142)
>
> * * *
>
> CASTELLANO: So he [Daly] gave it back to the guy [Matthews], huh?
>
> GIARDINA: No problem. He says he gave it back to him, I think it was this fellow, the, uh the stepson Lent, Norman Lent (ph) or something.
>
> CASTELLANO: Yeah. Who did he [Daly] give it back to? He gave it back to Norman Lent?
>
> GIARDINA: No. He [Daly] gave it back to Matthews in front of him, Norman. You know, see

> he [Daly] could have been off base, George. (A. 143)

Thus, the June 2, 1983 conversation makes it clear that neither Castellano nor Giardina could have assisted in (or even contemporaneously known of) the repayment of any monies to Matthews. Although one cannot tell from the conversation when Daly returned the money to Matthews, Matthews testified that he received $50,000 of the $100,000 that he had given to Miron (the only monies he ever received in repayment) in or about July of 1982.

Accordingly, even considered in the light most favorable to the government, the evidence was that Matthews was repaid in July of 1982 and that although Giardina and Castellano believed that Matthews should be repaid, they later learned that he had

in fact already been repaid. As a result, none of the money that Miron gave to Castellano or that Castellano subsequently gave to Giardina was ever given to Matthews.

## Reasons for Granting the Writ

### POINT I

PETITIONER'S CONVICTION OF OBSTRUCTING A FEDERAL CRIMINAL INVESTIGATION SHOULD BE REVERSED BECAUSE THERE WAS NO ONGOING FEDERAL INVESTIGATION TO OBSTRUCT AND BECAUSE THE RETURN OF MONEY TO A PURPORTED CO-CONSPIRATOR CANNOT, AS A MATTER OF LAW, CONSTITUTE BRIBERY.

The "obstruction of an investigation" statute, 18 U.S.C. § 1510, prohibits "willful[] endeavors by means of bribery to obstruct, delay or prevent the communication of information relating to a violation of any [federal criminal statute] by any person to a [federal criminal investigator]." Although the jury convicted the petitioner Giardina of violating this section, there are two reasons why his conviction must be reversed. First, the government failed to prove that there was, in fact, any criminal

investigation which was in progress (or even contemplated) when $50,000 was returned to Matthews. Second, the $50,000 repayment to Matthews did not constitute bribery, as is required by § 1510, because it was merely the return of Matthews' own money.

1. Section 1510 requires both an ongoing investigation and defendant's knowledge of the investigation.

In United States v. Siegel, 717 F.2d 9 (2d Cir. 1983), the Court of Appeals for the Second Circuit reversed the conviction of one of the defendants for obstructing a federal investigation because there was no federal investigation in progress and hence, no federal criminal investigator existed who was about to receive information concerning a violation of federal law. The same conclusion is compelled here.

In Siegel, the defendant Abrams was told by one of his customers that if he did not extend him an $80,000 credit, he would "go[] to the SEC." The government proceeded on the theory that when Abrams subsequently extended this credit to the customer -- who had in essence threatened to make a charge to a criminal investigator -- he had "bribed" the putative informant in violation of § 1510.

In the instant case, as in Siegel, neither the petitioner nor the would-be informant (Matthews) were aware whether any federal criminal investigation was being conducted when the latter's demand for money was met. Similarly, as in Siegel, the payment in this case was made in response to a threat by an accomplice that if such payment was not made, he would go to the authorities.

On the very similar facts presented in Siegal, the Second Circuit reversed the defendant's conviction:

> We hold only that where there was no federal investigation either being conducted or contemplated, where there was no federal criminal investigator about to receive information, where the payment was solicited by the "informant" and, where the defendant's sole knowledge of the possession of the communication of information to federal authorities was derived from a threat by a customer that if he did not get a credit on goods purchased he would go to the SEC, § 1510 was not violated. (Id. at 21.)

Although the Court in Siegel did not view its decision as having conclusively settled the question whether a criminal investigation must always be in progress for a conviction under § 1510 to lie, all of the elements underlying the Court's reasoning in Siegal are present in this case.

First, there was no federal investigation being conducted or contemplated with respect to the Port Mobil facility until the reference to Matthews' repayment was discovered fortuitously while agents were listening to conversations they had intercepted from the Castellano home in the spring of 1983. Second, there was no federal criminal investigator about to receive any information from Matthews in July of 1982 when the repayment was purportedly made. Third, the payment was solicited -- as a form of blackmail -- by the accomplice and putative informant Matthews from his co-conspirators. Fourth, the only knowledge which the petitioner Giardina had that Matthews might communicate information to a law enforcement officer derived from Matthews' threat that if he did not get

his money back, he would go "to the authorities." Since these elements are similar if not identical to the elements underlying the decision in Siegel, that case compels the conclusion that in the absence of an ongoing federal criminal investigation, petitioner's conviction on the "obstruction of an investigation" count must be reversed.

In addition to the decision in Siegel, the legislative history of § 1510 also supports petitioner's argument. The House Report, in particular, establishes that the statute was meant to apply only where there exists a federal investigation of which the defendant is aware, and federal investigator who can be identified. Explaining the "required criminal

scienter" of § 1510, the House Report states:

> Being [sic] criminal statute, the required criminal scienter is a necessary element of the crime. For example, if a person does not know that the investigator is a federal investigator, an act which would normally be in violation would not be so because of the lack of the scienter as to the identity of the investigator. It should be made clear here that under the scope of the act State investigators are not included; only Federal investigators are included. (H.R.Rep. No. 658, 90th Cong., 1st Sess. 2, reprinted in 1967 U.S. Code Cong. & Admin. News 1760 at 1762 [hereinafter "House Report]).

It is self-evident that a defendant cannot seek to impede or prevent the reporting of information to a person he knows to be a "federal investigator" if he is not even aware that any federal investigation is underway. Nevertheless, the Court of Appeals attempted to resolve this problem by holding that the reference by Castellano and

Giardina that Matthews might go to the "Task Force"[5/] if he was not repaid was sufficient -- even though the "Task Force" is a state, rather than federal, entity -- because Castellano and

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5/ On the May 5, 1983 tape, Castellano told Giardina: "I think Julie's still trying to shake him [Matthews] down. He hasn't given up. This guy's [Matthews] gonna go to the Task Force" (A. 106). Despite the holding by the Court of Appeals, it is respectfully submitted that this statement is not sufficient to satisfy the "Federal criminal investigator" element of § 1510. In the first place, it is more likely that Castellano's reference to the "Task Force" was a reference to the New York State Organized Crime Task Force (see N.Y. Executive Law § 70[a]) rather than to the FBI, the United States Attorney's Office or the Federal Organized Crime Strike Force. Secondly, the later statement by Castellano that: "I don't think he's a member of the Task Force. I'm almost sure he's not a cop" (A. 138), appears to be a general reference to a state law enforcement officer, as opposed to a federal agent.

Giardina "did not place a premium on precision in names and titles." United States v. Daly, supra, slip op. at 27.

Clearly, however, this equivocal reference could not legally support a finding, beyond a reasonable doubt, that the condition precedent to a violation of § 1510 -- that there exist an identifiable federal investigator -- has been met. As the Court in United States v. Williams, 470 F.2d 1339, 1343 (8th Cir.), cert. denied, 411 U.S. 936, 93 S.Ct. 1912 (1973) held: "To hold otherwise would allow inferences to be drawn by the process of speculation or on mere possibilities."

Besides indicating Congress' intent that the defendant know of the existence of a federal investigator, the legislative history also shows that Congress meant for § 1510 to apply only

after an investigation is actually underway. In other words, § 1510 was not intended to reach bribery of a potential informant at the pre-investigation stage. As the House Report explicitly states, § 1510 was enacted because "there is no statute which presently protects witnesses during the investigatory stage. House Report, supra at 1762.

In sum, the legislative history and the Court's decision in Siegel establish that in order for a violation of § 1510 to lie, there must be a federal criminal investigation in progress of which the defendant is aware. Nevertheless, the Court of Appeals upheld the petitioner's conviction on the ground that Siegel does not require an ongoing criminal investigation in every case under § 1510, and because despite

the legislative history, "the jury could infer both that there was a federal investigation and that the defendants feared that Matthews would make his disclosures to federal investigators." United States v. Daly, supra, slip op. at 28. As shown, these conclusions are in error and warrant review by this Court on certiorari.

2. The Return to an Accomplice of His Own Funds Does Not, As a Matter of Law, Constitute Bribery Under § 1510.

The Second Circuit Court of Appeals also held that even though the $50,000 payment to Matthews amounted to the return to an accomplice of his own money, the transaction constituted bribery as required by § 1510. The Court's holding is in direct conflict with the decision by the Fifth Circuit Court of Appeals in United States v. Cameron, 460 F.2d 1394 (5th Cir. 1972)

that § 1510 does not reach transactions between accomplices. Accordingly, this Court should grant a writ of certiorari to resolve the conflict in these two circuits on this important issue.6/

In Cameron, the defendant was convicted under § 1510 for directing his accomplice Wright not to say anything about stolen funds which they had in their possession. The Fifth Circuit reversed his conviction, holding that § 1510 was designed to deter the coercion of innocent informants, not to deal with communications between

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6/ Although petitioner relied extensively on Cameron in his appeal to the Second Circuit, the Court never mentioned Cameron and thus never even attempted to reconcile its holding with the decision in that case.

accomplices.7/ As the Court explained, the statute deals with the activities of three separate classes of individuals:

> A. A criminal investigator who is conducting an investigation of a violation of a criminal statute of the United States;
>
> B. The person who has information as to the offense which some third party endeavors to prevent communication of to A, and
>
> C. The party denounced by the statute who willfully endeavors by means of bribery, misrepresentation, intimidation or force or threat thereof to obstruct, delay, or prevent communication of the information by B to A. (Id. at 1401.)

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7/ The Fifth Circuit relied in large part upon the legislative history of § 1510 in drawing this conclusion, and quoted extensively from the House Report. 460 F.2d at 1400-01. The Second Circuit reached the opposite conclusion based on the identical excerpt from the House Report. Daly, slip op. at 28.

As the Court noted, Wright, the person whom Cameron was allegedly trying to prevent from communicating with a criminal investigator, fell into category C, as did the defendant:

> In the present indictment, Wright is charged to have been the accomplice of Cameron, and therefore must fall under C above, along with Cameron. But there is no one involved who can be B except Wright, the claimed recipient of Cameron's admonition to say nothing about the money . . . Put another way, if the United States desired to prosecute Cameron under § 1510 for directing or advising Wright to say nothing about the currency, it should have left Wright out as an accomplice in that enterprise. (Id. at 1401-02.)

In this case, it is clear that Matthews remained an accomplice and co-conspirator until July of 1984, when he negotiated an immunity agreement with

the government.8/ Indeed, when first approached by Federal investigators in May of 1984, he too sought to conceal the relevant facts surrounding the Port Mobil transactions from the government. Thus, under the rationale of Cameron, since Matthews was the accomplice of the defendants Daly, Miron and Giardina, he does not fit within that

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8/ The law is well settled that an individual who has knowingly joined a conspiracy remains a co-conspirator until he withdraws from the conspiracy. Withdrawal requires an affirmative act to defeat or disavow the purpose of the conspiracy. United States v. Arocena, 778 F.2d 943 (2d Cir. 1985), cert. denied, 475 U.S. 1053, 106 S.Ct. 1281 (1986). Since Matthews was a conspirator, he was an accomplice to all substantive offenses in furtherance of the conspiracy. See Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 (1946); United States v. Brennan, 629 F. Supp. 283 (E.D.N.Y.), aff'd, 798 F.2d 581 (2d Cir. 1986).

class of individuals to which 18 U.S.C. § 1510 has been held applicable.

As noted, the Court of Appeals in this case held that § 1510 is not restricted to cases involving innocent informants. The Court further noted that by attempting to bribe Daly, Matthews had relinquished any legal right he might otherwise have to his $100,000. Finally, the Court concluded that although Castellano repeatedly indicated that Matthews should be repaid because he had not received any quid pro quo, the jury was entitled to infer that the payment to Matthews was not simply the return of his money but an attempt to buy his silence.

The facts presented by this prosecution are really indistinguishable from any instance in which a person who has been wrongfully deprived of his

property demands that it be returned under the threat that otherwise, he will "go to the authorities." Indeed, given the Second Circuit's decision, § 1510 may now reach a whole host of situations as to which no one would ever even have thought it might apply. For example, if an individual rents a car from Hertz and keeps it beyond the date agreed upon, Hertz's threat that they will "go to the authorities" unless he returns the car, followed by a return of the car, would result in Hertz's violation of § 1510. In fact, in virtually every instance in which someone threatens that unless his property is returned, he will "go to the authorities," a violation of § 1510 would obtain.

It is most respectfully asserted that the Congress never intended this

statute to apply to instances such as those described above. For this reason, a writ of certiorari should be granted and petitioner's conviction for violating § 1510 should be reversed.

## POINT II

### THE ADMISSION OF HEARSAY AS "EXPERT," "BACKGROUND" EVIDENCE TO PROVE THE EXISTENCE OF A RACKETEERING ENTERPRISE DEPRIVED THE PETITIONER OF HIS RIGHT TO A FAIR TRIAL.

As indicated in the Statement of Facts, supra, the trial court permitted FBI Agent James Kossler to give broad-reaching testimony. Much, if not all, of Kossler's testimony was nothing more than his opinion concerning alleged facts and transactions which he claimed established the existence and operation of the racketeering enterprise charged. The government argued that this evidence constituted "expert" testimony that was indispensable to the jury's understanding of the prosecution's tape-recorded conversations. As a result of this disingenuous claim of "background" proof, a massive amount of

prejudicial, inadmissible hearsay evidence was received by the jury.

The Court of Appeals upheld the admission of Kossler's testimony as "expert testimony that was relevant to provide the jury with an understanding of the nature and structure of organized crime families." Daly, supra, slip op. at 18. This conclusion was based, inter alia, upon the Court's finding that the subject of organized crime "was outside the expectable realm of knowledge to the average juror." Id.

An examination of the subject matter of the 56 pages of "expert" testimony provided by Kossler (A. 195-250), however, reveals it was not of the type for which any expert opinion was required or should have been admitted. Traditionally, expert testimony has

been permitted in instances in which the court perceives that the jury might need assistance in understanding some complicated process or jargon. However, virtually none of Kossler's testimony fits into that category.

Other than defining some slang terms which were probably familiar to the jury in the first place, most of the Agent's assertions were simply the conclusions he had drawn based upon "facts" which any person of ordinary experience could accept or reject for himself. For example, Agent Kossler was permitted to testify that Paul Castellano was the "Boss" of the Gambino crime family (A. 203). Obviously, there was no need for an expert to assist the jury in determining who the boss of the Gambino crime family was. Upon such matters, jurors

can form their own conclusions based upon traditional proofs.

Nevertheless, Agent Kossler was permitted to testify that: (i) the enterprise charged (the Gambino crime family) in fact existed; (ii) that it was an organized crime family; (iii) what its historical foundation and makeup was; (iv) who the members of the family were; (v) what their relative positions in the family were; (vi) how the enterprise allegedly operated and what specific activities it was involved in; and (vii) what family members purportedly "meant" by statements contained on tape-recorded conversations.

Although the Court of Appeals held that these were appropriate subjects for expert testimony, the case law establishes that expert testimony is

properly reserved for cases in which jurors need assistance in understanding the evidence or determining a fact in issue. See Fed.R.Evid. 702.

For example, in United States v. Ardito, 782 F.2d 358 (2d Cir.), cert. denied, 476 U.S. 1160, 106 S.Ct. 2281 (1986), the Court of Appeals for the Second Circuit held that it was permissible for an FBI agent to explain such terms as "captain," "capo," "regime," and "crew," since those terms appeared in recorded conversations which were played to the jury. Similarly, in United States v. Riccobene, 709 F.2d 214, 230-31 (3d Cir.), cert. denied sub nom. 464 U.S. 849, 104 S.Ct. 157 (1983), the Third Circuit upheld the district court's admission of the testimony of an FBI agent which was limited "to a defini-

tion of terms involved, [particularly since the district court] instructed the jury that the testimony was to be considered only for its definitional value." Finally, in United States v. Hutchings, 757 F.2d 11, 13 (2d Cir., cert. denied, 472 U.S. 1031, 105 S.Ct. 3511 (1985), the Second Circuit held that it was proper for an undercover agent who was a participant in tape-recorded conversations with the defendant to define the terms used by them during their conversations. Obviously, the use of Agent Kossler's "expert" testimony in the case at bar is a far cry from the cases cited above.

While defense counsel can sympathize to some extent with the plight of the district courts in trying to find some manageable procedure to deal with the

scope of the government's proof in RICO conspiracy cases, it is most respectfully asserted that the shortcut used below, and approved by the Court of Appeals, is not the answer.9/ To permit an FBI agent to take the stand and seek to prove the government's case through his alleged "expert" opinions renders a defendant's ability to effectively defend more theoretical than real.

In this regard, the admonitions of Circuit Judge Newman in his concurring opinion in United States v. Young, 745 F.2d 733, 766 (2d Cir.), cert. denied

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9/ The claim that the trial court viewed this procedure as a shortcut is supported by the comments of Judge Weinstein that: "Rather than have a lot of witnesses come in I'm allowing this testimony to come in as general background." (A. 196)

sub nom. 470 U.S. 1084, 105 S.Ct. 1842 (1984), are particularly germane:

> The "aura of special reliability and trustworthiness" surrounding expert testimony, which ought to caution its use . . . especially when offered by the prosecution in criminal cases . . . poses a special risk in a case of this sort. That risk arises because the jury may infer that the agent's opinion about the criminal nature of the defendant's activity is based on knowledge of the defendant beyond the evidence at the trial. The risk is increased when the opinion is given by "the very officers who were in charge of the investigation" (emphasis supplied).

Equally disturbing, Agent Kossler's testimony was rather transparently tailored to fit the particular facts and circumstances of this prosecution. Indeed, the testimony of Agent Kossler carried with it the very strong implicit assertion that the facts which he knew were going to be adduced during the prosecution's case indicated that

the defendant had acted in conjunction with the organized crime enterprise charged. For example:

> Q. [By AUSA Ward]: Would you describe for the jury how organized crime infiltrates the labor unions in the New York area?
>
> * * *
>
> A. One of the primary efforts on the part of organized crime families is to control various labor unions throughout their area . . . Sometimes organized crime figures have been able to take over these unions through force, others through intimidation, sometimes -- many times the unions are passed from father to son . . . (A. 210-11)
>
> * * *
>
> Q. You used a phrase "labor peace," what does that mean?
>
> A. . . . What will happen, the company or the business will pay through the union or the LCN member to see that there is labor peace, there are no strikes.
>
> Q. Would that be in a situation where a job was done non-

union or with people from a different local?

* * *

THE WITNESS: In a case where non-union labor is allowed to complete a job or a function where there is union available, union people available, it's very unusual that it is allowed to be done without some kind of influence. (A. 214)10/

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10/ Following Kossler's testimony, the government went on to establish that in this case, it was alleged that "organized crime" figures had attempted to obtain "labor peace" for a company so that it could use "non-union" labor and workers from a "different local." The government further proved that the petitioner Giardina was preceded as President of Local 23 of the Mason Tenders Union by his father. Thus, it is clear that Kossler's testimony was designed to convince the jury that any defendant's conduct which paralleled what he had described as indicia of organized crime activity should result in the conclusion that such defendant was a member of the organized crime enterprise charged.

It is somewhat difficult to tell precisely why the trial court found Kossler's testimony to be admissible, and the Court of Appeals' discussion of the issue is equally not illuminating. Apparently, the testimony came in as a sort of hybrid. That is, it was admitted as "expert" testimony; however, it was not offered for the truth of the facts asserted, but only as "background."

The proffer of otherwise inadmissible hearsay on the ground that it is somehow admissible because it provides "background" is a practice which seems to have gained alarming popularity with the government. As the First Circuit Court of Appeals noted in United States v. Odufowora, 814 F.2d 73, 74 (1st Cir. 1987):

> When [the Government was] met with unanswerable objections here

> to the rankest hearsay, the Government would say that the evidence was part of the "background," or explain[ed] why the Marshal took the action he did. As if that sterilized all imperfections. It also contends that much of the evidence was not admitted for its truth . . . this limitation, however, is a recent discovery, unsupported by any rulings, and quite contrary to the use the Government made of the evidence (emphasis supplied).

Indeed, virtually every recent decision dealing with the admission of so-called "background" proof has been unanimous in condemning the practice. In each instance, it has been emphasized that the characterization of evidence as "background" is not a talisman by which the government can otherwise avoid the prohibition against hearsay. See, e.g., United States v. Pedroza, 750 F.2d 187, 200 (2d Cir. 1984) ("The Government argues that the hearsay statements were properly admitted as 'background.' There is no

such exception to the hearsay rule"); United States v. Odufowora, supra; United States v. Brown, 767 F.2d 1078, 1083-84 (4th Cir. 1985); United States v. Jannotti, 729 F.2d 213, 219 (3d Cir.), cert. denied, 469 U.S. 880, 105 S.Ct. 243 (1984) ("The Government, however, has cited no authority for a 'background' exception to the hearsay rule, and we will therefore assume that these tapes should have been excluded from evidence at trial").

Nonetheless, the evidence was admitted as background here. Moreover, to compound the already confused situation, the district court, in its final instructions to the jury, contradicted its earlier admonitions and told the jurors that they could consider Kossler's "expert," "background" testimony as direct evidence of the enter-

prise element of the RICO conspiracy charge. As Judge Weinstein told the jury:

> You are not to consider the agent's testimony as evidence of the crimes charged in the indictment except as proof of that overall continuing enterprise. (A. 1258-59)

Clearly, Kossler's testimony, which was simply undiluted hearsay, should never have been received for the truth of the facts asserted therein on this essential element of the government's case.

In conclusion, in the words of Judge Brown in his concurring opinion in Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), "[T]here comes a time when enough is more than enough -- it is just too much." With regard to the nature and magnitude of the "expert," "background" evidence presented at the trial in this case, it

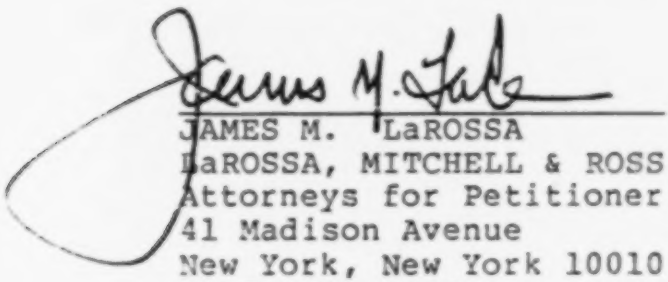
is respectfully asserted that the government surpassed all permissible evidentiary boundaries. A defendant confronted with this kind of proof truly has no effective means of confrontation. Moreover, to permit the Government to prove the charges in RICO conspiracy indictments in this manner not only rewards the prosecution, but serves to encourage mega-prosecutions, in which a defendant's ability to separately confront witnesses or to have the jury consider the proof against him independently, is completely abrogated.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
May 25, 1988

Respectfully submitted,



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# APPENDICES

**APPENDIX A**

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 295, 294 August Term, 1987
(Argued: October 13, 1987
Decided: March 28, 1986)

Docket Nos. 87-1257, -1258

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UNITED STATES OF AMERICA,

Appellee,

- v. -

GEORGE DALY and LOUIS GIARDINA,

Defendants-Appellants.

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Before: KEARSE, PIERCE and PRATT,
Circuit Judges.

Appeals from judgments entered in the United States District Court for the Eastern District of New York, following a jury trial before Jack B. Weinstein, Chief Judge, convicting both

defendants of violating the Taft-Hartley Act, 29 U.S.C. §§ 186(a)(2) and (b)(1), and convicting defendant Giardina of obstruc-tion of a criminal investigation, in violation of 18 U.S.C. § 1510, and RICO conspiracy, 18 U.S.C. § 1962(d).

Affirmed.

DOUGLAS GROVER, Special Attorney, United States Department of Justice, Organized Crime Strike Force, Brooklyn, New York (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Brooklyn, New York, Laura Ward, Special Attorney, United States Department of Justice, Brooklyn, New York, Louis M. Fischer, Deborah Watson, United States Department of Justice, Washington, D.C., on the brief), for Appellee.

JAMES KOUSOUROS, New York, New York (William F. Suglia, New York, New York, on the brief) for Defendant-Appellant Daly.

JAMES M. LaROSSA, New York, (John W. Mitchell, LaRossa, Mitchell & Ross, New York, New York, on the brief), for Defendant-Appellant Giardina.

KEARSE, Circuit Judge:

Defendants George Daly and Louis M. Giardina appeal from judgments entered in the United States District Court for the Eastern District of New York, following a jury trial before Jack B. Weinstein, Chief Judge, convicting Daly on two counts of accepting bribes in violation of the Taft-Hartley Act, 29 U.S.C. §§ 186(a)(2) and (b)(1) (1982); and convicting Giardina on one count of aiding and abetting Daly in receipt of a bribe, in violation of 29 U.S.C. §§ 186(a)(2) and (b)(1) and 18 U.S.C. § 2 (1982); one count of obstructing a criminal investigation, in violation of 18 U.S.C. § 1510 (1982); and one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d) (1982). Daly was sentenced

to two consecutive one-year prison terms, fined $10,000 on each count, and required to pay a special assessment of $50 on each count. Giardina was sentenced to concurrent prison terms of five years each on the conspiracy and obstruction counts and one year on the Taft-Hartley count, to fines totaling $40,000, and to special assessments of $50 on each count. On appeal, Daly contends that the trial court erred in admitting in evidence certain surveillance tapes, and he challenges his sentence as excessive. Giardina contends that the court erred in admitting expert testimony as to the existence and operations of the Gambino organized crime family, and he challenges the sufficiency of the evidence to convict him on any count. For the reasons below, we affirm the judgments of conviction.

## I. BACKGROUND

Daly and Giardina were named in a 22-count superseding indictment charging them and 14 other defendants with various crimes arising out of activities of the Gambino crime family. Daly was charged in five counts: one count of conspiring to conduct a pattern of racketeering activity through the Gambino family in violation of 18 U.S.C. § 1962(d), three counts of accepting bribes in violation of the Taft-Hartley Act, 29 U.S.C. §§ 186(a)(2) and (b)(1), and one count of conspiring to pay a bribe to one Thomas Patchell in violation of 29 U.S.C. § 186(a)(2). Giardina was charged in four counts: one count of RICO conspiracy in violation of § 1962(d), one count of aiding and abetting Daly's receipt of a bribe in

violation of 29 U.S.C. §§ 186(a)(2) and (b)(1) and 18 U.S.C. § 2, one count of conspiring to pay a bribe to Patchell in violation of 29 U.S.C. § 186(a)(2), and one count of obstructing a federal criminal investigation in violation of 18 U.S.C. § 1510. Daly, Giardina and codefendant Julie Miron were severed from the other defendants for trial.

The government's case against these three defendants was presented principally through the testimony of Robert Matthews, an officer of Matthews Industrial Piping Co. ("Matthews Piping"), a piping contractor located in the Bronx, New York; and tape recordings the government had obtained through surveillance of the home of Paul Castellano, then the boss of the Gambino crime family. Summarized briefly and taken in the light most

favorable to the government, the evidence at trial showed the following events.

A. The Payments By Matthews

Daly was the business agent-at-large for Local 638 of the Enterprise Association of Steam Fitters ("Local 638"), which had jurisdiction over steamfitting jobs in the five boroughs of New York City and on Long Island. Giardina, who also was active in New York labor union affairs, was an acquaintance of both Daly and Castellano. Miron was a lumber contractor who was acquainted with Castellano, Daly, and other union officials.

In 1981, Matthews Piping submitted a $10 million bid for a contract to replace the piping in a deepwater oil

storage and pipeline facility at Port Mobil in Staten Island, New York ("Port Mobil"). Because Local 638 could supply only a small number of welders with the skills necessary to perform the Port Mobil job, Matthews planned to use welders from other states, and his bid was premised on the lower cost of the imported labor.

Matthews testified that in the fall of 1981, anticipating that he would need the cooperation of Local 638 in his attempt to import welders for the Port Mobil job, Matthews met with Daly, explained why he needed to use imported labor, and gave Daly $5,000 in cash. Daly told Matthews he would see what he could do. In November, Matthews Piping was awarded the Port Mobil contract. Despite the payment to Daly, when the imported welders began working, Local

638 picketed the jobsite. The picketing was led by Thomas Patchell, a business agent for Local 638. Matthews testified that he still believed, however, that Daly could quiet the union. Accordingly, in December 1981, while the picketing was in progress, he met with Daly and gave him another $5,000 in cash.

Matthews Piping filed charges with the National Labor Relations Board, seeking to have the pickets removed. The parties reached a settlement in which the union agreed to remove the pickets for 30 days. During the 30-day period, Patchell discovered that the imported welders belonged to other locals around the country. He filed charges against these welders for accepting employment with a nonunion contractor, causing the "ring leader"

among the out-of-state welders to be fined by his local and threatened with expulsion. As a result, Matthews lost most of his welders on the jobsite. He complained to Daly, but Daly replied that he was unable to control Patchell.

In January 1982, seeking advice on how to solve his problem with Local 638, Matthews consulted Miron, whom he had known for some twenty years, because "Miron had pretty good union connections, he knew a lot of the big people." Miron assured Matthews that he would arrange to eliminate the union's objection to the imported welders, but that Miron "would have to pass out a hundred thousand dollars to people." Some weeks later, Matthews delivered $50,000 in cash to Miron at Miron's home, agreeing to bring the remaining $50,000 at a later time.

Miron assured Matthews that he would take care of the problem. Miron gave $25,000 of this payment to Daly. He also gave $15,000 to Castellano, who, in turn, gave at least $4-5,000 to Giardina.

Some months after the first visit, Matthews returned to Miron's home with the remaining $50,000. When Miron stated that he had given $25,000 of the first payment to Daly, Matthews replied that he thought Miron foolish to give money to Daly, because he did not believe Daly could be of help. Matthews told Miron that Matthews had previously given Daly $10,000. Miron responded that Matthews should never have paid money to Daly directly.

Despite his efforts to neutralize Patchell, Matthews was forced on May 6, 1982, to sign a collective bargaining

agreement with Local 638. As a result, his costs on the Port Mobil job were higher than he had originally anticipated. On several occasions thereafter, Matthews contacted Miron, unsuccessfully demanding the return of his money.

In early May 1983, Matthews sent Miron a registered letter, threatening to go to the authorities if at least some of his money were not returned. In the first week of May, Matthews met with Daly and similarly threatened to go to the FBI or other authorities. As revealed by the surveillance tapes discussed below, Matthews's threat was promptly relayed by Daly to Giardina and by Giardina to Castellano.

B. The Payment to Matthews

At least as early as March 1983, the FBI was conducting an investigation

into the activities of the Gambino crime family. In an ongoing electronic surveillance, government agents intercepted and recorded many conversations at the home of Castellano. Tape recordings of several of these conversations were played for the jury in order to provide background information on the nature and structure of organized crime in general and the Gambino family in particular. As discussed in greater detail in Part II.B. below, FBI agent James Kossler testified as an expert on the matters heard on the tapes, and he outlined the process by which the Gambino family had gained control over certain labor unions in the New York City area.

Daly's voice was not identified on any of the tapes. Giardina was a participant in at least three conversa-

tions. These included one on May 5, 1983, and one on June 2, 1983, in which Giardina and Castellano discussed the payments that Matthews had made to Daly and Miron.

In the May 5, 1983 conversation, Giardina told Castellano that Daly had called Giardina the day before with some urgency, to tell him that Matthews was threatening to "go[] to the Task Force." Castellano responded, "You know why," stating it was because Daly had "robbed his money." Castellano viewed Daly's actions as a detriment to the entire organization. He was annoyed both because Daly had failed to give any money to Patchell to secure Patchell's assistance, and thereby had failed to give Matthews the labor peace he had bargained for, and because Daly had accepted $5,000 from Matthews on

his own initiative, without the approval of Castellano. Giardina defended Daly, stating that he had received Daly's assurance that some of the money had been distributed to labor officials other than Patchell and that those payments had permitted Matthews to get at least some work done on the Port Mobil project.

The conversation repeatedly returned to Matthews's threat to go to the authorities, with Giardina noting that "he's crying cop," and that Daly was "worried that Matthews is gonna rat him out." Castellano noted that Matthews had a close connection with "somebody named Lent in Congress." Giardina thought Lent was a member of a Task Force or that Matthews had some other close relative who was a member of a Task Force. Finally, having noted that

"[t]he deal was a hundred," that Daly was supposed to receive $50,000 and share it with Patchell, and that the family was supposed to receive the other $50,000, Castellano determined that Matthews would have to be paid at least $25,000, which "may not be enough."

On June 2, 1983, Giardina returned to Castellano's home. He reported that he had received assurances from Daly that money had been returned to Matthews. On June 6, Miron reported to Castellano that he had retrieved $25,000 from Daly and would return it to Matthews.

In all, in the spring or summer of 1983, in accordance with Castellano's orders, Miron returned $50,000 to Matthews in two $25,000 installments.

C. The Defense Case

Dale testified in his own behalf. He confirmed many of the events testified to by Matthews, including Matthews's 1981 request to use imported labor on the Port Mobil job and to have Daly "lay off him." He described a conversation with Matthews during the first week of May 1983, in which Matthews stated that he had given a large amount of money to Miron and that he was going to go to the FBI or other law enforcement authorities; Daly acknowledged that he had promptly -- perhaps on the same day -- reported Matthews's threat to Giardina. Daly testified, however, that Matthews had never offered him any money, either on the Port Mobil project or at any other time when Daly was an agent for Local 638.

Giardina did not testify and presented no evidence in his defense.

D. The Verdicts

At the close of the evidence, Chief Judge Weinstein dismissed the conspiracy-to-bribe count as to all three defendants for lack of evidence that they had conspired to bribe Patchell. He also dismissed the RICO conspiracy count against Daly, finding that, of the three bribes alleged to have been taken by Daly, the evidence indicated that only one, the $100,000, was taken pursuant to a conspiracy, and the two alleged $5,000 payments had been merely "private taking[s]." Thus, the two $5,000 bribes could not be attributed to the alleged RICO enterprise, and the court concluded that Daly could not be convicted of the two

predicate acts essential to the establishment of a RICO conspiracy involving him.

The jury found Daly guilty on two of the three Taft-Hartley counts, finding that he had taken a $5,000 bribe from Matthews in November 1981 and had conspired with Miron and Giardina to take the final $100,000 bribe. It acquitted him of the charge that he had accepted a second $5,000 payment in December 1981. Giardina was found guilty on all of the undismissed counts against him, i.e., the Taft-Hartley offense of aiding and abetting Daly in the receipt of the $100,000 bribe, obstruction of the federal criminal investigation by seeking to bribe Matthews with the repayment of part of the $100,000, and a RICO conspiracy

encompassing both the Taft-Hartley and the obstruction offenses.

Daly and Giardina were sentenced as indicated above.

## II. DISCUSSION

On his appeal, Daly argues principally that the trial court erred in admitting the FBI surveillance tapes into evidence against him. He also contends that his sentence was unduly harsh. Giardina contends principally that much of the testimony of agent Kossler should have been excluded and that the evidence was insufficient to support his conviction on any count. For the reasons below, we reject all of defendants' arguments.

A. The Admissibility of the Tapes Against Daly

The FBI surveillance tapes were admitted against Daly on the ground, inter alia, that they reflected statements of his coconspirators in furtherance of the conspiracy. See Fed. R. Evid. 801(d)(2)(E). Daly contends that admission of the tapes on this ground was improper because there was insufficient evidence to connect him with the alleged conspiracy. He also contends that the tapes that did not mention him, which were admitted as background and served as proof of a RICO enterprise, should have been excluded as to him once the court dismissed the RICO conspiracy count against him. We reject both contentions.

In order to admit out-of-court statements pursuant to Rule 801(d)(2)(E), the trial court must find that

the government has established by a preponderance of the evidence that there was a conspiracy, that both the declarant and the party against whom the statements are offered were members of the conspiracy, and that the statements were made in furtherance of the conspiracy. See, e.g., United States v. DeJesus, 806 F.2d 31, 34-35 (2d Cir. 1986), cert. denied, 107 S.Ct. 1299 (1987). In making these preliminary factual determinations, the court may take into account the proffered out-of-court statements themselves if those statements are sufficiently reliable in light of independent corroborating evidence. Bourjaily v. United States, 107 S.Ct. 2775, 2781-82 (1987). The evidence in the present case plainly warranted admission of the tapes against Daly.

The pertinent discussions on the May 5, 1983 tape were, according to Giardina's introduction, precipitated by Dealy's May 4, 1983 telephone call to and meeting with Giardina to tell him that Matthews was threatening to go to the authorities if some of his money were not returned to him. There was discussion, inter alia, of Daly's having received at least $5,000 in cash directly from Matthews and an additional $25,000 of Matthews's money from Miron. Giardina and Castellano discussed the $15,000 of Matthews's money that they themselves had received and shared; and Castellano described Matthews's threat to go to the authorities as a problem "we" now have. These details were corroborated by the trial testimony of Matthews or of Daly himself. Thus, Matthews testified that

he had paid Daly $5,000 in cash; that Miron had promised to help with the labor problems but would have to pass out $100,000 to various "people"; that after receiving money from Matthews, Miron told Matthews he had paid $25,000 of that money to Daly; and that Miron's reaction to learning that Matthews had already given Daly $10,000 was that Matthews should not have given the money to Daly directly. Daly testified that in early May 1983, after Matthews had threatened to go to the authorities if he did not get some of his money back, Daly immediately informed Giardina of the threat. Thus the evidence independent of the tape provided sufficient corroboration of the detailed recorded statements to warrant a finding that the taped conversation was reliable. According-

ly, the court could consider that tape in determining whether there was in fact a conspiracy among Daly and the participants in the taped conversations.

The May 5 conversation plainly showed that Daly's receipt of a portion of Matthews's $100,000 was part of a joint venture. Castellano stated, for example, that "[t]he deal was a hundred," of which Daly was to get $50,000 and "we" were to get the other $50,000; that Daly was supposed to have given some of his $50,000 to Thomas Patchell and that the Gambino family had relied on Daly to do so ("[W]e thought this man was gonna produce. All of a sudden, we get a hold of Tom, Tom says he didn't get money."); and that the family would have to give some money to Matthews in light of Daly's

failure to produce. These were statements that plainly were made in furtherance of a continuing conspiracy, of which at least Castellano, Miron, Giardina, and Daly were members, and the tape was thus properly admitted as substantive evidence against Daly.

Nor do we find merit in Daly's argument that once the RICO conspiracy count was dismissed as against him, the tapes of conversations that did not mention him should not have been considered against him and that their admission "constituted extreme unfair prejudice which resulted in his conviction on Counts 7 and 9." (Daly brief on appeal at 45.) Preliminarily, we note that this argument does not appear to have been properly preserved for appeal, since Daly's objection to the trial court's proposed charge that "all

evidence in the case was admissible against all defendants," was simply that "there should be some type of limitation there." There was no apparent attempt to distinguish between tapes on which Daly was mentioned and those on which he was not mentioned.

Even were the objection properly preserved, however, we would reject it for two reasons. First, notwithstanding the dismissal of the RICO conspiracy count as against Daly, the tapes that did not mention Daly were properly admitted as background information, and the fact that there may have been only one act by Daly that could serve as a RICO predicate act did not mean that the jury should not have been given the setting against which the alleged $100,000 payment was made.

Finally, even if the jury should have been instructed to ignore the non-Daly tapes in considering the counts against Daly, the failure so to charge is not a reason to reverse. Daly was charged on three Taft-Hartley counts of receiving bribes. The evidence that Daly had received at least one $5,000 bribe and part of the $100,000 bribe was overwhelming. The jury found him guilty on those two counts and acquitted him on the third. We think it plain, both from the strength of the evidence and from the fact of an acquittal on one count, that the admission of the background information against Daly did not prejudice him.

B. The Admission of Kossler's Testimony

Giardina does not challenge the admission of the surveillance tapes

against him. Rather, he contends that the admission of Kossler's testimony, part of which related to the tapes, denied him a fair trial because it included hearsay evidence that was neither needed as expert testimony nor proper as background evidence. We disagree.

Rule 702 of the Federal Rules of Evidence gives the trial judge broad discretion to admit expert testimony when he believes it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 703 provides that

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,

> the facts or data need not be admissible in evidence.

Fed. R. Evid. 703 (emphasis added). Thus, if experts in the field reasonably rely on hearsay in forming their opinions and drawing their inferences, the expert witness may properly testify to his opinions and inferences based upon such hearsay. United States v. Wright, 783 F.2d 1091, 1100-01 (D.C. Cir. 1986); Soden v. Freightliner Corp., 714 F.2d 498, 502 (5th Cir. 1983). The decision of the trial court to admit expert testimony is to be sustained on appeal unless it is shown to be "manifestly erroneous." Salen v. United States Lines Co., 370 U.S. 31, 35 (1962); United States v. Nersesian, 824 F.2d 1294, 1308 (2d Cir.), cert. denied, 108 S.Ct. 355 (1987); United States v. Cruz, 797 F.2d 90, 96 (2d Cir. 1986).

In light of these principles, subjects held to be appropriate for expert testimony have included explanations of organized crime structure such as the relative positions of "capo," "captain," and "crew," see United States v. Ardito, 782 F.2d 358, 363 (2d Cir.), cert. denied, 475 U.S. 1141 (1986); explanations of organized crime jargon, see United States v. Riccobene, 709 F.2d 214, 230-31 (3d Cir.), cert. denied, 464 U.S. 849 (1983), and explanations of coded language, see United States v. Levasseur, 816 F.2d 37, 45 (2d Cir. 1987). Expert testimony that is otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. Fed. R. Evid. 704.

Independent of the matter of expert testimony, the trial court may admit evidence that does not directly establish an element of the offense charged, in order to provide background for the events alleged in the indictment. Background evidence may be admitted to show, for example, the circumstances surrounding the events or to furnish an explanation of the understanding or intent with which certain acts were performed. See United States v. Pedroza, 750 F.2d 187, 200 (2d Cir. 1984). If the evidence admitted as background consists of, or repeats, out-of-court statements that are hearsay and are not admissible by virtue of an exception to the hearsay rule, the background evidence generally is not properly admitted for the truth of the matters there asserted. When, however,

the background evidence is testimony of the witness based on his own knowledge, or is expert testimony as to opinions or inferences arrived at in reliance on the type of evidence normally relied on by experts in the field, it may properly be considered as evidence of the truth of the matters asserted.

Kossler's testimony was properly admitted as expert testimony that was relevant to provide the jury with an understanding of the nature and structure of organized crime families. There is no question that there was much that was outside the expectable realm of knowledge of the average juror. For example, Kossler identified the five organized crime families that operate in the New York area; he described their requirements for membership, their rules of conduct and

code of silence, and the meaning of certain jargon, such as the distinction between "a friend of ours" (i.e., a member of organized crime) and "a friend of mine" (i.e., only a personal acquaintance and not an organized crime member before whom "family" matters could be discussed); and he described how, in general, organized crime has infiltrated labor unions.

With respect to the conversations heard on several of the surveillance tapes, Kossler identified the various labor unions and their officials who were mentioned. He identified crime family members mentioned, and as to some stated whether they held office in a labor union. Nothwithstanding Giardina's contention that there was no need for expert testimony, the trial court's view that these were matters as

to which such testimony could be of assistance to the jury was not unreasonable, and the admission of the testimony was not an abuse of discretion.

Further, Kossler's testimony was, by and large, general insofar as it described organized crime's infiltration of labor unions and did not touch upon Matthews's payments to Daly or Miron or the subsequent payment to Matthews. Kossler did not mention Local 638 except to identify its trade jurisdiction; he did not mention Daly, Miron, or Giardina at all, and he did not testify at all with respect to any of the tapes on which Giardina was heard and Daly was discussed.

The only element of an offense on which Kossler's testimony touched directly was the existence of a RICO

enterprise, as he gave his understanding of the existence of organized crime and the Gambino family. Although the trial judge originally told the jury that it could not use the expert testimony to establish directly "anything at issue in the case," he eventually instructed the jury that the testimony could be considered as "proof of the[e] overall continuing enterprise." There was no objection by defendants to the latter charge; nor, given Kossler's unchallenged qualifications to testify as an expert, would such an objection have been sustainable under Rules 702, 703, and 704.

Finally, we find no flaw in the manner in which the trial court performed the functions assigned to it in determining whether and to what extent to allow Kossler's testimony to

be used. It found, in accordance with Fed. R. Evid. 403, that the prejudice likely to be caused by admission of the evidence would not outweigh its probative value. Upon introduction of the testimony, the court instructed the jury that it was not required to accept the expert's testimony and that the question of "[w]hether there is any organized crime, whether these defendants had anything to do with organized crime, is for you to decide . . ."; the final instructions made clear that it was the jury's province to determine whether or not the individuals named in the indictment functioned as an "enterprise." We conclude that the trial court's treatment of the testimony of Kossler did not deny Giardina a fair trial.

C. The Sufficiency of the Evidence Against Giardina

Giardina contends that the evidence at trial was insufficient to convict him of aiding and abetting Daly's receipt of money in violation of the Taft-Hartley Act, of obstruction of a criminal investigation in violation of 18 U.S.C. § 1510, and, perforce, of having committed those offenses pursuant to a RICO conspiracy. In challenging the sufficiency of the evidence to support his conviction, a defendant bears a heavy burden. United States v. Sumnicht, 823 F.2d 13, 15 (2d Cir. 1987); United States v. Losada, 674 F.2d 167, 173 (2d Cir.), cert. denied, 457 U.S. 1125 (1982). In reviewing such a challenge, we must credit every inference that could have been drawn in the government's favor, United States v. Bagaric, 706 F.2d 42,

64 (2d Cir.), cert. denied, 464 U.S. 840 (1983), "must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses," United States v. LeRoy, 687 F.2d 610, 616 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983), and must affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt, United States v. Taylor, 464 F.2d 240, 245 (2d Cir. 1972). These principles apply whether the evidence being reviewed is direct or circumstantial. See Glasser v. United States, 315 U.S. 60, 80 (1942). Giardina has not carried his burden.

1. Aiding and Abetting the Taft-Hartley Violation

The Taft-Hartley Act makes it unlawful for an employee of a labor organization to accept money from an employer whose employees are represented by that organization. See 29 U.S.C. §§ 186(a)(2) and (b)(1). The indictment charged that Daly, employed by Local 638 as business agent-at-large, had received part of the $100,000 from Matthews in violation of these sections, and that in so doing he had been aided and abetted by, inter alios, Giardina. Giardina contends that the evidence was insufficient to support his conviction of aiding and abetting because it did not show that he had consciously sought to assist in Daly's receipt of the money, or that he was even aware of the payment until

after the bribe had been fully consummated. We disagree.

While Giardina is correct that "[a] person cannot be found guilty of aiding and abetting a crime that already has been committed," United States v. Shulman, 624 F.2d 384, 387 (2d Cir. 1980), the evidence here, taken in the light most favorable to the government, easily permitted the jury to infer that Giardina had been associated with receipt of the $100,000 payment from the outset. The evidence showed, inter alia, that the Gambino crime family, led by Castellano, had been successful in infiltrating and gaining control over labor unions, and that Giardina was an aide to Castellano in labor matters. It was inferrable that Giardina had a close working relationship with Daly. He had known Daly for

years, and he discussed with Castellano Daly's involvements in other jobs; Giardina spoke of being able to "square" arrangements with Daly. When Matthews threatened to go to the authorities, it was to Giardina that Daly, in Giardina's words, "comes running down." When Castellano decided that Matthews should receive some money back, it was Giardina who pressed Daly to make the repayment. Giardina reported on June 2, "I've been on his back every day."

It was Giardina who had introduced Daly to Miron. Miron, before receiving any payment from Matthews, told Matthews that in order to secure labor peace, $100,000 would have to be paid to various "people." The natural inference was that those "people" would, in exchange for the $100,000,

eliminate Matthews's union problems. That inference was confirmed by the conversation between Giardina and Castellano on May 5, which made clear that the "deal" had been that Matthews would pay $100,000, that the Gambino family would receive half of this, that Daly would receive the other half, and that the family was relying on Daly to "produce" by passing some of his $50,000 to Patchell. Though Daly apparently did not carry out his part of the deal, it was clear that upon receiving the first $50,000 payment from Matthews, Miron gave half to Daly and $15,000 to Castellano, and that Castellano gave about one-third of that amount to Giardina.

In all, the evidence was ample to permit the jury to infer beyond a reasonable doubt that Giardina has

associated himself from the outset with the arrangements whereby Daly, Giardina, and others in the Gambino crime family would share the $100,000 from Matthews in exchange for eliminating Matthews's problems with Local 638.

2. Obstruction of an Investigation

Section 1510 of 18 U.S.C. prohibits "willful[] endeavors by means of bribery to obstruct, delay, or prevent the communication" "by any person to a [federal] criminal investigator" of information relating to a violation of any federal criminal statute. Giardina was convicted of violating this section by reason of the payment to Matthews of $50,000 in response to his threat to go to the authorities. Giardina contends that the evidence was insufficient to support his conviction under this section principally because there was

no ongoing federal investigation to obstruct and because the return to Matthews of his own money could not, as a matter of law, constitute bribery. We are unpersuaded.

Preliminarily, we note that, in arguing that there was no existing federal investigation when the $50,000 was returned to Matthews, Giardina argues that Matthews received this money in July 1982. Though Matthews did so testify, the record makes plain that his recollection as to the timing was hazy. His responses to cross-examination efforts to pin down the timing were that he did not recall, but that "[i]f you want me to guess it was in the middle of '82." While Matthews's "guess" was 1982, his testimony was clear that the money was not paid to him until after he had

written a registered letter to Miron threatening to go to the authorities. The record as a whole easily permitted the inference that this letter was written in 1983, not 1982. Thus, Congressman Norman Lent, whom Miron asked to intercede, placed the date of the letter in May 1983. Daly, who testified that Matthews had made the same threat to him orally, placed that conversation in the first week of May 1983. And the first taped conversation in which Giardina reported the threat to Castellano, and in which Castellano order the payment to Matthews, occurred on May 5, 1983. Thus, there was ample evidence from which the jury could find that the $50,000 payment was made to Matthews in response to his threats to go to the authorities in 1983.

Slightly more troublesome is Giardina's contention that § 1510 requires both an ongoing investigation and the defendants' knowledge of the investigation. Our decision in United States v. Siegel, 717 F.2d 9 (2d Cir. 1983), on which Giardina relies, does not support this proposition. In that case, we explicitly "emphasize[d] [t]hat we [we]re not deciding . . . that § 1510 requires the existence of an actual criminal investigator or that an ongoing criminal investigation be in progress." Id. at 21. The government argues that the legislative history of § 1510 suggests that no investigation need be in progress because Congress intended that section to complement 18 U.S.c. §§ 1503 and 1505 (1982), which prohibit threats, bribery, extortion, etc., of witnesses and informants only

after judicial proceedings have begun, see United States v. Vesich, 724 F.2d 451, 454 (5th Cir. 1984) (attempt to obstruct a criminal investigation before a proceeding has been begun is not within § 1503). The congressional report relied on by the government does not appear to support the view that § 1510 reaches bribery of a potential informant at the pre-investigation stage. Though the report described § 1510 as "extending to informants and potential witnesses the protections now afforded witnesses and jurors [under §§ 1503 and 1505]," H.R. Rep. No. 658, 90th Cong., 1st Sess. 1, reprinted in 1967 U.S. Code Cong. & Admin. News 1760 ("House Report"), it ascribed the need for a section such as § 1510 to the fact that "there is no statute which presently protects witnesses during the

investigative stage," id. at 1762 (emphasis added). Further, the House Report included a discussion of "the required criminal scienter" which seemed to suggest that there must be a federal investigation of which the defendant is aware. See id. ("For example, if a person does not know that the investigator is a federal investigator, an act which would normally be in violation would not be so because of the lack of the scienter as to the identity of the investigator.").

Nonetheless, here, as in Siegel, it is unnecessary to decide whether § 1510 requires an ongoing criminal investigation, because the evidence was sufficient to support an inference that in fact there was an ongoing federal criminal investigation and that

Castellano and Giardina sought to prevent Matthews from disclosing his information to federal investigators. Though the federal investigation into the Port Mobil job itself did not begin until after the payment was made to Matthews, there was an ongoing investigation into the infiltration of labor unions by the Gambino crime family. It was in the course of that investigation that the FBI obtained wiretap authorizations for the home of Castellano and secured the surveillance tapes that were admitted into evidence.

Giardina argues that, notwithstanding the FBI investigation, he and Castellano spoke only in terms of a threat by Matthews to go to a "Task Force," and that the only extant "Task Force" so denominated was a state, rather than federal, entity. Hence, he

argues, there was no indication that he sought to impede communication to a "federal" investigator. We disagree. The jury was properly instructed that in order to find Giardina guilty under § 1510, it must find that the payment to Matthews sought to impede his communication of the Taft-Hartley violation to "a federal" criminal investigator. We think the jury was entitled to ascribe minimal significance to the fact that the principal federal investigation was conducted by a group denominated "Strike Force" rather than "Task Force," since it was plain from the surveillance tapes that Castellano and Giardina did not place a premium on precision in names and titles. More importantly, Giardina's argument fails to consider the other relevant evidence in the light most

favorable to the government. That evidence included the fact that Daly testified that when Matthews spoke to him in May 1983, threatening to go to the authorities, Matthews may have mentioned the FBI, and that Daly reported to Giardina exactly what Matthews had said. Further, Giardina reported to Castellano that Matthews had threatened to Daly that he would go to the "Task Force"; Castellano identified Lent as a Congressman, plainly a federal official, and Giardina thought Lent was "supposed to be on a Task Force." Thus, there was sufficient evidence from which the jury could infer both that there was a federal investigation and that the defendants feared that Matthews would make his disclosures to federal investigators.

Finally, Giardina argues that his conviction under § 1510 must be set aside because bribery involves the conveyance of something of value, and § 1510 was not intended to reach the mere return to a potential informant of his own funds, especially where the informant had been a coconspirator of the defendant. Again, we disagree.

First, in seeking to protect communication "by any person," the statute uses an unrestricted term that does not on its face exclude persons who have themselves participated in the crimes to be disclosed. Moreover, the legislative history suggests that § 1510 was designed in part to preserve potential lines of communication from members of organized crime as well as from innocent informants. The House Report noted that "[t]he real need for

this legislation is in the difficulty encountered in the presentation of a case for trial in the field of organized crime and racketeering," and stated that the ability of organized crime to preserve its structure, power, and affluence lay in its "ability . . . to impose silence on its members." House Report at 1761 (emphasis added). Criminal investigations are facilitated by assistance from within a crime organization, and the prior misdeeds of the informant do not remove him and his potential information from the scope of § 1510.

Nor are we persuaded that defendants' $50,000 payment to Matthews did not constitute something of value to him because it was merely the return of his own money. Matthews had, in bribing the defendants, parted with owner-

ship of the $100,000; he plainly did not have an enforceable right either to recover those funds or to win damages for breach of his bargain. Thus, the $100,000 could no longer be considered funds belonging to Matthews.

At trial, defendants argued that the money repaid to Matthews was not a bribe to dissuade him from going to the FBI but was merely a return to him of part of his payment because the defendants regretted not having given him the labor peace he had sought to buy. Although in the May 5 conversation, Castellano repeatedly noted with disapproval that they had taken Matthews's money and had given him nothing in return, the question whether the impetus for the $50,000 payment to Matthews was simply remorse because he had not received the benefit of his

bargain or was instead an intent to dissuade him from informing the FBI was one for the jury. The jury was properly instructed on this question, and there was ample evidence from which it could infer that the $50,000 payment to Matthews was intended to purchase his silence. An entire year elapsed between Matthews's signing of the collective bargaining agreement with Local 638 and the time that Castellano ordered the return of the $50,000. During that time, Matthews repeatedly complained to Miron that he had not received the labor peace for which he had paid and that he wanted his money back. Castellano was evidently aware during this time that Matthews had received nothing for his money, for his immediate response on May 5, 1983, when Giardina reported that Matthews had

threatened to go to the authorities was neither a question nor a show of surprise, but rather a knowing "You know why, [Daly] robbed his money." Yet, despite the prior awareness that Matthews had been "robbed," apparently no member of the family made any effort to see that Matthews was repaid until Matthews threatened to go to the authorities. That threat, when communicated to Daly, resulted in Castellano's order the very next day for partial repayment. The jury was entitled to infer, both from the taped conversations and from the timing of the decision to make a repayment to Matthews, that the impetus for that decision was the desire to keep Matthews from "rat[ting]."

In sum, we conclude that the evidence supported Giardina's convic-

tion under § 1510. Since Giardina's challenge to his conviction of RICO conspiracy depended on our overturning his conviction of aiding and abetting the Taft-Hartly violation or of obstruction under § 1510, we also uphold his RICO conspiracy conviction.

D. Daly's Challenge to His Sentence

On each of the counts on which he was convicted, Daly received the maximum punishment. He was sentenced to two one-year prison terms, to be served consecutively, and fines of $10,000 on each count, for a total of $20,000. See 29 U.S.C. § 186(d). Pointing out that he is 60 years old, that he had never before been charged with a criminal offense, and that several witnesses attested to his reputation for honesty and good

character, he contends that his sentence is excessive. We find no basis for disturbing the sentence.

Under the principles applicable to Daly's appeal, a sentence that does not exceed the maximum provided by Congress is virtually unreviewable on appeal unless it was based on material misinformation or constitutionally impermissible factors. See United States v. Tucker, 404 U.S. 443, 446-47 (1972); United States v. Dazzo, 672 F.2d 284, 289 (2d Cir.), cert. denied, 459 U.S. 836 (1982). The sentencing judge is "'under no obligation to give reasons for his sentencing decisions.'" United States v. Vasquez, 638 F.2d 507, 534 (2d Cir. 1980) (quoting McGee v. United States, 462 F.2d 243, 247 (2d Cir. 1972)), cert. denied, 450 U.S. 970 (1981), and if he does not give

reasons, we will not presume that he has based his decision on improper factors.

In sentencing Daly to the maximum prescribed by the statute, Chief Judge Weinstein did not state his reasons. Daly speculates that the court may have chosen to credit testimony by Matthews that he had made unlawful payments to Daly on numerous other occasions or may have been influenced by the evidence that Daly was an associate of the Gambino crime family. He argues that the evidence of his link to organized crime was weak and that Matthews's testimony was incredible. There is no basis on which we could conclude that Matthews's testimony was incredible as a matter of law, or on which we could deny the district court's discretion to take into account, and credit if he

believed it credit-worthy, all matters that had come to his attention during the trial, see, e.g., 18 U.S.C. § 3577 (1982); United States v. Grayson, 438 U.S. 41, 50 (1978); United States v. Roland, 748 F.2d 1321, 1327 (2d Cir. 1984).

In sum, there is no basis upon which Daly's sentence may be disturbed.

## CONCLUSION

We have considered all of defendants' contentions in support of their respective appeals and have found them to be without merit. The judgments of conviction are in all respects affirmed.

APPENDIX B

Judgment of the Court of Appeals

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WEINSTEIN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of March, one thousand nine hundred and eighty-eight

Present: HON. AMALYA L. KEARSE,
HON. LAWRENCE W. PIERCE,
HON. GEORGE C. PRATT,

Circuit Judges,

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UNITED STATES OF AMERICA, 87-1257, -1258

Appellee,

V

GEORGE DALY and LOUIS GIARDINA,

Defendant-Appellants.

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Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgement of said District Court be and it hereby is AFFIRMED in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk

By /s/ Edward J. Guardaro
Edward J. Guardaro,
Deputy Clerk

## Appendix C -- Statutory Provisions

Title 18, United States Code:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be punishable as an offense against the United States, is punishable as a principal.

§ 1510. Obstruction of Criminal Investigations

(a) Whoever willfully endeavors by means of bribery to obstruct, delay or prevent the communication of information relating to a violation of any criminal statute of the United States

by any person to a criminal investigator shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States

Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affects, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate of 1% of

the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affects, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeer-

ing activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Title 29, United States Code:

§ 186. Restrictions on Financial Transactions

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of their right to organize and bargain collectively through representatives of their own choosing; or (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of

his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.